91-515

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

WILLIAM T. MCCORMICK,
Petitioner,
v.
AT & T TECHNOLOGIES, INC. and CAMERON ALLEN,
Respondents.

Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF *CERTIORARI*

THOMAS H. ROBERTS
2nd Floor, Suite A
33 S. 13th Street
Richmond, VA 23219

MARSHA S. BERZON
177 Post Street
San Francisco, CA 94108

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether a state law cause of action filed in state court by an employee covered by a collective bargaining agreement is completely preempted by § 301 of the Labor Management Act, 29 U.S.C. § 185, and therefore removable to federal court, where the claim as pleaded, and as fairly read, does not necessarily require the interpretation or application of the agreement, yet the agreement's construction may be an issue in the event that the defendant employer seeks to rely upon the agreement as part of a negating or affirmative defense?

2. Whether a state law claim for intentional infliction of mental distress filed in state court by an employee covered by a collective bargaining agreement is completely preempted by LMRA § 301 and therefore removable to federal court, whenever the actions complained of involve workplace behavior by the employer or an agent of the employer?

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PETITION FOR A WRIT OF *CERTIORARI*

Petitioner William T. McCormick hereby petitions this Court to issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit in *McCormick v. AT&T Technologies, Inc., et al.*, 934 F.2d 531 (4th Cir. No. 88-3542, May 28, 1991) (*en banc*).

OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Fourth Circuit is reported at 934 F.2d 531 (1991), and is reprinted in the separately bound appendix to this *certiorari* petition ("Pet. App.") at pp. 1a-33a. The United States District Court for the Eastern District of Virginia did not issue a written opinion; a transcript of its oral opinion is reprinted at Pet. App. 35a-39a, and a copy of the district court judgment is reprinted at Pet. App. 34a.

JURISDICTION

The Fourth Circuit issued its *en banc* decision and judgment on May 28, 1991. On August 15, 1991, the Chief Justice signed an order granting an extension of time within which to file a petition for writ of *certiorari* to and including September 25, 1991. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

28 U.S.C. § 1441 provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . . .

STATEMENT OF THE CASE

A. The Facts

Petitioner William T. McCormick was an employee of respondent AT&T Technologies, Inc. ("AT&T" or the "Company") until his discharge in October, 1986. McCormick worked at a facility covered by a collective bargaining agreement between AT&T and the Communications Workers of America. Although the incidents underlying this lawsuit occurred at about the same time as

McCormick's termination, this suit seeks to recover for injuries caused not by the discharge but by the Company's handling of certain of petitioner's personal property. Pet. App. 2a-3a, 7a.

As an AT&T employee, McCormick was issued a secure locker in which he kept both tools issued by his employer and personal property. That property included a letter from his ex-wife containing information that was private and, if revealed, would be extremely embarrassing to McCormick. Pet. App. 3a; Court of Appeals Joint Appendix ("C.A. Jt. App.") 61-62.

In late September, 1986, McCormick was ill for several weeks and did not report to work. Contending that McCormick did not keep the Company adequately informed about his absence, AT&T terminated his employment by a letter dated October 1, 1986. Pet. App. 2a.

The very next day, his supervisor cleaned out McCormick's locker and discarded his personal property, including the letter from McCormick's ex-wife, in a trash receptacle accessible to all employees. A fellow employee did, in fact, retrieve and pass the letter around to all the employees on McCormick's shift. Pet. App. 3a; C.A. Jt. App. 55.

When McCormick received AT&T's termination letter, he contacted the Company and arranged a meeting to discuss the discharge. At that meeting, held on October 3, 1986, McCormick stated that he knew that all the employees on his shift had seen the letter in question, and voiced his apprehensions on how its contents would be used. As a result of the meeting, AT&T vacated McCormick's discharge and returned him to his former position as of that night. Pet. App. 3a; C.A. Jt. App. 60-62.

As soon as McCormick arrived on the job, however, a fellow employee made a personal remark to him based upon the contents of the letter that caused petitioner such embarrasment and distress that he asked to be allowed

to leave the plant immediately. When this request was refused, McCormick left anyway, aware that his termination would be reinstated as a result. Pet. App. 3a; C.A. Jt. App. 55.

B. The Proceedings Below

(a) *District Court Proceedings*: McCormick filed a common law tort suit in the Virginia courts seeking to recover for the emotional and physical distress he suffered as a result of the exposure of his private affairs to a large number of his fellow employees. The complaint alleged generally that McCormick's supervisor knew that McCormick was in a weakened mental and emotional condition; that the exposure of his personal property caused McCormick mental, emotional and physical traumas; and that McCormick's supervisor knew or should have known that these injuries would occur from the actions taken with regard to the disposal of petitioner's property, but, either negligently or intentionally, carried out those actions anyway. Four common law causes of action—for intentional and negligent infliction of emotional distress, conversion, and negligence in the care of a bailment—were pleaded. Pet. App. 3a; C.A. Jt. App. 11-15.

AT&T removed the case to federal court, contending that McCormick's state tort causes of action are completely preempted by § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185; that his claims are in truth federal claims resting on the applicable collective bargaining agreement; and that his case should therefore be dismissed because barred by the applicable § 301 statute of limitations. C.A. Jt. App. 27-28.

On cross motions by McCormick for a remand and by AT&T for summary judgment, the district court refused to remand the case to state court, and granted summary judgment to the Company "[b]ecause the claims arise from conditions of employment governed by a collective bargaining agreement." Pet. App. 39a.

(b) *Fourth Circuit Majority Opinion*: On appeal, the Fourth Circuit decided, after briefing and argument in front of a three-judge panel but before opinion by that panel, to hear the case *en banc*. The full appeals court divided 4-3 on the pivotal legal issue in the case.

Writing for the four-judge majority, Judge Chapman, joined by Judges Russell, Widener and Wilkens, held that there is "complete preemption" of the state law claim in this case under *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), and its progeny. The majority held that § 301 completely displaces state law claims implicating an employment relationship whenever resolution of the claim could involve interpretation of an applicable collective bargaining agreement. As a consequence, the majority held, this case arises under federal law, federal court jurisdiction is proper, and the grant of summary judgment for failure to meet the applicable statute of limitations was correct. Pet. App. 13a-14a.

In the majority's view, each of McCormick's common law causes of action *could* be defended on the basis that AT&T owed petitioner no state law duty to keep his private property, locked in a secure locker, away from fellow employees, because the collective bargaining agreement authorized the Company to dispose of the property as it did. Pet. App. 10a. In so ruling, the majority pointed to no provision of the collective bargaining agreement that regulates lockers or disposal of employee private property generally, or that in terms permits AT&T to expose an employee to public ridicule by allowing fellow employees access to embarrassing private property the employee kept in a secure locker to which those employees had no access. Rather, the Fourth Circuit majority relied only upon a broad and vague management rights clause, providing generally that "the right to manage the business and to direct the working forces and operations of the same, subject to the limitations of this Agreement, is exclusively vested in, and retained by, the Company". Pet. App. 9a.

The majority below maintained that the answer to the question whether AT&T is legally entitled under Virginia law to dispose of McCormick's property as the Company did might ultimately involve arguments based upon the interpretation of the management rights clause of the collective bargaining agreement, as upon implied rights and duties under the agreement. That possibility, according to the majority, is sufficient to destroy petitioner's state tort law causes of action entirely. Pet. App. 9a-10a.

(c) *Fourth Circuit Dissenting Opinion*: Writing in dissent, and joined by Judges Sprouse and Murnaghan, Judge Phillips "disagree[d] fundamentally with the majority's view of the way in which the preemptive effect of § 301 upon state-law tort claims is to be analyzed." Pet. App. 19a.

Judge Phillips noted, first, that § 301 provides a federal cause of action only for suits for violation of collective bargaining agreements, not for suits "to enforce any claim by a union-employee against his employer or union that arises out of or is connected with his employment relationship, or that somehow touches on matters that might be the subject of labor relations." Pet. App. 22a. This Court's § 301 preemption cases, in the dissent's view, consequently limit preemption to state-law claims explicitly alleging violations of labor contracts and those claims that "can be determined to be claims for violations of labor contracts in substance though not in form." Pet. App. 23a. And, as the dissent read this Court's cases, the latter category of cases can be determined by "focus[ing] on where the *claimant* has located the duty allegedly breached by the employer or union-defendant." Pet. App. 23a (emphasis supplied).

Under this "claimcentered" approach (Pet. App. 26a), there is no preemption as long as the claim as defined under state law *could* impose a *noncontractual* duty and the plaintiff does not rely on any contractual source for the legal duty the defendant is alleged to have violated.

Where those conditions are met, then "a defendant's assertion . . . that a labor contract's terms provide either a negating or affirmative defense to the claim are irrelevant to the preemption issue." Pet. App. 27a. At the same time, "to the extent that [the] ultimate resolution [of the case] requires interpretation of a labor contract's terms, . . . federal law controls the interpretation [only]." Pet. App. 27a.

Applying this approach to the present case, the dissenters concluded that, as pleaded, each of McCormick's common law causes of action located the duty alleged to have been violated in general state tort law duties owed to all persons as a matter of law, and not in the collective bargaining agreement or in any other contract. In the dissent's view, therefore, these state law claims can go forward in state court, subject to the understanding that AT&T is entitled to raise as a defense the contention that the labor contract authorized the actions taken, so that those actions could not be determined to be "outrageous", "negligent" or "wrongful". Pet. App. 28a-32a.

REASONS FOR GRANTING THE WRIT

Introduction

In a case decided exactly one week before the present one—and in an opinion holding squarely the opposite of the holding here—the Ninth Circuit began by stating

> At first blush, both the rationale and method of analysis in [Labor-Management Relations Act § 301] preemption cases are straightforward . . . . Nor are we deprived of authoritative statements to guide our way. *Lingle* [*v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988)] is one, *Allis-Chalmers* [*Corp. v. Lueck*, 471 U.S. 202 (1985)] is another.
>
> In reality, section 301 has been the precipitate of a series of often contradictory decisions, so much so that "federal preemption of state labor law has been

> one of the most confused areas of federal court litigation." *Note, The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 Yale L. J. 209 (1989). [*Galvez v. Kuhn*, 933 F.2d 773 (9th Cir. 1991).]

The Ninth Circuit's characterization of the litigation generated by LMRA § 301 preemption as "one of the most confused areas of federal court litigation" is not hyperbole but an eminently fair characterization of the chaotic situation in the courts of appeals.

To be sure, this Court, recognizing the importance of the questions presented here, has sought to delineate for the lower courts the circumstances in which the § 301 federal common law of labor contracts precludes state causes of action from going forward where the plaintiff is an employee covered by a collective bargaining agreement. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Electrical Workers v. Hechler*, 481 U.S. 851 (1987); *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987); *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988). *See also Steelworkers v. Rawson*, —— U.S. ——, 110 S. Ct. 1904 (1990).

Despite the attention this Court has paid to this problem, however, the lower federal courts continue to be flooded with cases raising § 301 preemption issues, and continue to disagree with one another on the proper method of analyzing these issues.

Indeed, the four-three division in the Fourth Circuit, sitting *en banc* in the present case, is symptomatic of the division in the circuits. Each opinion in the present case relies on decisions from other circuits that do indeed support that opinion, and that, by definition, are in hopeless conflict with still other circuit court decisions. *See* Pet. App. 29a n.4 (Phillips, J., dissenting) (conceding that the majority opinion below properly notes that its preemption holding on the intentional infliction of mental distress count is in accord with those of three circuits, but

noting that two other circuits support the dissent's view, while a third has ruled both ways.)

This case squarely presents for decision two critical aspects of this continuing controversy:

First—as the compelling analysis in the dissenting opinion in this case shows—much of the confusion in the lower courts results from a disagreement as to whether § 301 preemption law is "claim-centered"; *viz.*, as to whether preemption turns only upon the *plaintiff's* need to rely upon the applicable collective bargaining agreement as one of the essential elements pleaded in the complaint *or* turns as well on the need to consult that agreement in resolving the case because the *defendant* intends to rely on the agreement as a defense.

As to that question, there is the plainest of circuit conflicts:

The First, Fourth, Eighth and Ninth Circuits hold that a defendant can indeed defeat a state cause of action simply by announcing that the defendant intends in some way to rely upon an applicable collective bargaining agreement as part of its *defense*.

The Sixth and Tenth Circuits hold squarely to the opposite.

And, while both the language and the underlying rationale of this Court's cases as a whole clearly favor the approach of the dissent in this case—which is also the approach of the Sixth and Tenth Circuits—there is at least one sentence in *Lingle* v. *Norge Division of Magic Chef, Inc.*, *supra*, that suggests otherwise, and that appears to be a contributing cause to the lower courts' disarray. Pp. 10-16, *infra*.

Second, there is a multi-faceted circuit conflict—with a split that does not precisely mirror the one as to the "claim-centered" controversy—on whether state causes of action for intentional infliction of emotional distress

growing out of the manner in which a discharge or other discipline is carried out, available in a increasing number of states, are completely preempted by § 301 where the plaintiff is covered by a collective bargaining agreement.

The Fifth and Tenth Circuits agree with the majority in the present case that such claims are preempted.

The Third Circuit agrees with the dissent below that such claims are not preempted.

And, the Sixth, Seventh, Eighth and Ninth Circuits all hold that such claims may be preempted or not, yet apply three different standards for separating preempted state causes of action for intentional infliction of mental distress from those not preempted. Pp. 16-25, *infra*.

The attention this Court has paid to § 301 preemption questions in recent years demonstrates the importance to a coherent labor policy of a proper delineation of the role of state law employment-related causes of action in a workplace where a collective bargaining agreement governed by federal common law is in place. Since the complexity of the § 301 preemption issues presented here has led to continuing circuit conflicts, it is imperative that this Court once more draw the precise dividing line between the federal labor laws and state law.

A. The Circuit Split on the Question Whether LMRA § 301 Preemption Analysis is Claimcentered:

(1) In this case, as in many others, the state court complaint did not in terms rely upon any collective bargaining agreement at all, and there is no basis for reading the complaint as *necessarily* relying on the applicable agreement as the source of the legal duty the defendant is alleged to have violated. To the contrary, the complaint, fairly read, contends that under the applicable state law the defendant employer owed to the plaintiff employee the same duty the defendant would have owed to any individual over whose property, for whatever reason, the defend-

ant had custody, and that the defendant violated that duty. C.A. Jt. App. 11-12, 14-15.

AT&T, however, has maintained that the Company is entitled under state law to defend this case on the basis that the broad management rights clause in, or in the alternative some implied provision of, the collective bargaining agreement affirmatively sanction its actions here. It is AT&T's position that simply by raising a labor-contract-based defense—without regard to whether the defense would turn out to have any merit if put to the test—the Company renders petitioner's state law cause of action a legal nullity. Like the majority in this case, the First, Eighth, and Ninth Circuits, have accepted this breathtaking expansion of § 301 preemption.

For example, in *Magerer v. John Sexton & Co.*, 912 F.2d 525 (1st Cir. 1990), the First Circuit addressed the question of whether § 301 preempts a state law cause of action for retaliatory discharge that differed from the cause of action upheld against a preemption attack in *Lingle*, *supra*, only in that the pertinent statute provided a defense where "any right in this section is inconsistent with an applicable collective bargaining agreement." 912 F.2d at 527, n.1. Because it would be necessary to construe the collective bargaining agreement in order to evaluate any such defense if raised, the First Circuit held the retaliatory discharge cause of action preempted. *Id.* at 530-31. *See also Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111, 118 (1st Cir. 1988) (holding that a state cause of action is preempted by § 301 as long as a waiver defense is available under state law).

Similarly, the Ninth Circuit, in two cases, has held that an employee's state law privacy claim is preempted whenever the defendant employer contends that the privacy right is waived by the management rights clause, or some other provision, of the applicable collective bargaining agreement. *Utility Workers v. Southern California Edison*, 852 F.2d 1083, 1086-87 (9th Cir. 1988); *Laws v.*

Calmat, 852 F.2d 430, 433 (9th Cir. 1988); *see also Newberry v. Pacific Racing Ass'n.*, 854 F.2d 1142, 1146 (9th Cir. 1988).[1]

And, the Eighth Circuit, in *Hanks v. General Motors Corp.*, 859 F.2d 67, 70 (8th Cir. 1988), held emphatically that "defenses as well as claims must be considered in determining whether resolution of the state law claim requires construing the collective bargaining agreement." *See also Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620, 623 (8th Cir. 1989).

Just as emphatically, the Sixth Circuit has embraced the "claim-centered" analysis articulated in the dissenting opinion in this case, several times reiterating that "[i]t is *irrelevant* to the preemption question whether or not the employer can defend by showing it had the rights under the collective bargaining agreement to do what it did." *O'Shea v. Detroit News*, 887 F.2d 683, 687 (6th Cir. 1989) (emphasis added); *see also Fox v. Parker Hannifin Corp.*, 914 F.2d 795, 800 (6th Cir. 1990) ("a defendant's reliance on a [collective bargaining agreement] term purely as a defense does not result in section 301 preemption"); *Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1334 (6th Cir.) (*en banc*), *cert. denied*, —— U.S. ——, 110 S. Ct. 539 (1989) (that the defendant may "assert that its treatment of Smolarek was allowed or required by the terms of the collective bargaining agreement . . . does not support removal to federal court").

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[1] In *Stikes v. Chevron USA, Inc.*, 914 F.2d 1265 (9th Cir. 1990) the Ninth Circuit similarly held that a state law privacy claim is preempted by § 301, but did so on a slightly different basis than *Utility Workers* and *Laws*: *Stikes* purported to view the collective bargaining agreement not as a defense to a state law privacy cause of action, but as part of the plaintiff employee's prima facie claim because pertinent to whether the employee's claimed expectation of privacy was reasonable. 914 F.2d at 1270. *See also Schlachter-Jones v. General Telephone of California*, 936 F.2d 435 (9th Cir. 1991) (adopting a similar approach). Neither *Stikes* nor *Schlachter-Jones*, however, disavowed *Utility Workers* or *Laws*, but instead reiterated their holdings. 914 F.2d at 1268; 936 F.2d at 439-41.

Similarly, the Tenth Circuit, in *Local No. 57 v. Bechtel Power Corp.*, 834 F.2d 884, 889 (10th Cir. 1987), held that even if a state court "would find the collective bargaining agreement relevant to show waiver or consent as a state-law defense to plaintiffs' allegations," there would still be no complete § 301 preemption of a state law claim, and no federal court jurisdiction over such a claim.

In short, a more direct and pronounced difference among the courts of appeals on a basic issue critical to the decision of a recurrent issue of federal law—and, indeed, of federal jurisdiction—is difficult to imagine.

(2) One would think, from the deep split in the circuits as to the impact of collective-bargaining-agreement-dependent *defenses* on § 301 preemption analysis, that this Court's cases do not address the issue. To the contrary, in *Caterpillar, Inc. v. Williams*, *supra*, one question directly raised was whether "§ 301 preempts a state-law claim even when the employer raises only a defense that requires a court to interpret or apply a collective bargaining agreement," and the Court was equally direct in answering that question in the *negative*:

> It is true that when a defense to a state claim is based on the terms of a collective bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives. But the presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule—that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court. When a plaintiff invokes a right created by a collective-bargaining agreement, the plaintiff has *chosen* to plead what we have held must be regarded as a federal claim, and removal is at the defendant's option. But a *defendant* cannot,

> merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law. [482 U.S. at 398-99 (emphasis in original).]

To be sure, as Judge Phillips notes in the dissent in this case (Pet. App. 24a-25a), there is *one* passage in this Court's *Lingle* opinion that could be read to suggest that in determining § 301 preemption issues, it is proper to anticipate defenses that may be raised and to determine whether it will be necessary to construe or apply the collective bargaining agreement in adjudicating those defenses. *See* 486 U.S. at 407 (surveying the elements of the plaintiff's case in a state law retaliatory discharge proceeding, and the elements of the defense thereto, and concluding, "Thus, the state-law remedy in this case is 'independent' of the collective bargaining agreement in the sense of 'independent' that matters for § 301 preemption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement.")

There is, however, *no* indication that *Lingle* intended so casually to overrule *Caterpillar* on a question directly raised and decided *only* in the earlier case. To the contrary, *Lingle* elsewhere in the opinion relies heavily upon *Caterpillar*, quoting language from *Caterpillar* that incorporates *Caterpillar's* "claim-centered approach."[2] And, *Lingle* also takes care to recognize that there may be cases in which there is a question concerning the interpre-

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[2] That passage reads in part:

> "Section 301 governs *claims founded* directly on rights created by collective-bargaining agreements, and also *claims* 'substantially dependent on an analysis of a collective-bargaining agreement' . . . . [C]ontrary to Caterpillar's assertion, . . . respondents' *complaint* is not substantially dependent upon interpretation of the collective bargaining agreement. *It* does not rely upon the collective agreement indirectly, nor does it address the relationship between the individual contracts and the collective agreement." [486 U.S. at 410, n.10 *quoting Caterpillar*, 482 U.S. at 394-95 (emphasis supplied).]

tation of a collective bargaining agreement but *no* § 301 preemption; in that event, said the *Lingle* Court, "federal law would govern the interpretation of the agreement, but the separate state law analysis would not thereby be preempted." 486 U.S. at 413 n.12. There can, of course, be *no* such cases under the complete preemption approach espoused by the majority below.

It is equally to the point that where, as in this case, suit is originally filed in state court, general principles of federal jurisdiction preclude reliance upon a federal *defense* as a basis for removal. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 12 (1983); *Gully v. First National Bank*, 299 U.S. 109, 112-113 (1936). That principle is reiterated at the outset of *Caterpillar*, 482 U.S. at 391-92, and is referred to in the passage quoted above holding that a defense based upon a collective bargaining agreement is not a basis for § 301 preemption. Thus, to read the *Lingle* opinion as holding otherwise would be to construe *Lingle* not only as overruling *Caterpillar* but also as putting into question one of the most basic rules of "[t]he century-old jurisdictional framework governing removal of federal question cases from state into federal courts," *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 63 (1987).

Caterpillar's conclusion regarding the "claim-centered" nature of § 301 preemption is, moreover, the conclusion that is fully consistent with both the language and the underlying purposes of § 301: As Judge Phillips noted below, the federal statute provides federal jurisdiction and federal substantive law *only* where the plaintiff seeks to adjudicate his/her *contract-based* rights, either in form or in substance. Pet. App. 23a. Unless § 301 preemption is similarly limited, the result would be to destroy state causes of action, even though there is no suitable federal substitute. Indeed, employers could achieve this result by raising frivolous defenses; *viz.*, defenses that would have little or no chance of success if adjudicated on the merits.

The animating consideration underlying § 301 preemption—the assurance of uniformity in the interpretation and application of collective bargaining agreements [3]—can, moreover, be fully achieved without thus sacrificing the state law rights of employees covered by collective bargaining agreements. As Judge Phillips explained in his dissent, under the "claim-centered" approach while the plaintiff employee's state law

> *action* is to be resolved under state law . . . to the extent that its ultimate resolution requires interpretation of a labor contract's term, . . . federal law controls the interpretation. [Pet. App. 27a (emphasis in original).]

Thus, *Caterpillar*'s conclusion that § 301 preemption is "claim-centered" is entirely correct. At the same time, since the confusion sowed by the courts of appeals' various readings of *Lingle* has led to a sharp cleavage among the circuits on the question whether anticipated defenses should be taken into account in determining § 301 preemption, this Court should grant *certiorari* to clear up this matter once and for all.

B. The Circuit Split on the Question Whether LRMA § 301 Preempts State Causes of Action for Intentional Infliction of Mental Distress:

(1) The courts of appeals are divided not only on the proper overall approach to analyzing § 301 preemption

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[3] *See, e.g., Allis-Chalmers Corp. v. Lueck, supra*, 471 U.S. at 210-11:

> If the policies that animate § 301 are to be given their proper range . . . the pre-emptive effect of § 301 must extend beyond suits alleging contract violations. . . . The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.

problems but on the specifics of whether the increasingly common state causes of action for intentional infliction of emotional distress are preempted by § 301 where the plaintiff employee is covered by a collective bargaining agreement.

The Fourth Circuit majority in this case held that such causes of action are completely preempted by § 301 because contractual considerations are necessarily relevant in determining whether or not particular behavior is "outrageous and intolerable", an element of the state tort cause of action. Pet. App. 10a.

The Fifth and Tenth Circuits have adopted essentially the same approach, and reached the same result. *Brown v. Southwestern Bell Telephone Co.*, 901 F.2d 1250, 1256 (5th Cir. 1990); *Johnson v. Beatrice Foods Co.*, 921 F.2d 1015 (10th Cir. 1990). *See also Miller v. AT&T Network Services*, 850 F.2d 543 (9th Cir. 1988).[4]

At the same time, as the Tenth Circuit expressly notes in *Johnson v. Beatrice Foods, supra*, "other circuits have reached varying results when applying the *Allis Chalmers* and *Lingle* holding to state tort claims for intentional infliction of emotional distress." 921 F.2d at 1021. The other circuits referred to are the Third, Sixth, Seventh, Eighth and Ninth and we now detail the resulting multifaceted circuit split.

(a) *The Third Circuit*: Among the cases cited in *Johnson v. Beatrice Foods, supra*, as reaching "conflicting results," to that reached by the Fourth, Fifth and Tenth Circuits is *Krashna v. Oliver Realty, Inc.*, 895 F.2d 111 (3rd Cir. 1990).

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[4] While the *Miller* case embraces the premise that the collective bargaining agreement is necessarily relevant in such cases in order to determine whether the employer's behavior is sufficiently "outrageous," the Ninth Circuit has *not* followed that premise to the conclusion that § 301 uniformly preempts all intentional infliction of mental distress cases. *See* p. 21, *infra*.

In *Krashna*, the Third Circuit squarely held that, as a general matter, claims by employees covered by a collective bargaining agreement for intentional infliction of emotional distress are not preempted because such claims are "clearly outside the scope of the collective bargaining agreement and § 301 of the LMRA." 895 F.2d at 114. It is plain from the *Krashna* opinion that the Third Circuit so holds even where the employer's actions alleged as tortious involve employment conditions arguably committed to managerial discretion as an ordinary matter. *See* 895 F.2d at 115 n.5 (allegations of harassment in the complaint included ordering the plaintiff to work contrary to doctor's orders, unjustified disciplinary warnings, and unfair work assignments).

Under the Fourth Circuit's approach in this case, focussing upon whether the state cause of action arises from a working condition that may be implicated by the applicable collective bargaining agreement, the intentional infliction claim in *Krashna* would certainly have been preempted.

(b) *The Sixth Circuit*: The law in the Sixth Circuit is along the same line as—but slightly more complex than —the law in the Third Circuit.

O'Shea v. Detroit News, *supra*, 887 F.2d at 687, arose when the employer allegedly transferred an elderly employee covered by a collective bargaining agreement to a night shift, knowing that the employee had health problems, in order to force him to retire. Because "the News *could have* tortiously caused O'Shea emotional distress without violating the contract", the Sixth Circuit held the cause of action *not* preempted. *Id.* (emphasis added).

Here, as well, the state court complaint does not contend that the actions taken by AT&T were in violation of the collective bargaining agreement. Thus, under the standard applied in *O'Shea*, the present cause of action

for intentional infliction of emotional distress could not be preempted.

In two later cases, *Knafel v. Pepsi-Cola Bottlers of Akron, Inc.*, 899 F.2d 1473, 1483 (6th Cir. 1990) and *Fox v. Parker Hannifin Corp.*, *supra*, 914 F.2d at 795, the Sixth Circuit elaborated upon the standard applicable to the § 301-preemption-of-intentional-infliction-of-mental-distress cases. Drawing on this Court's holding in *Farmer v. United Brotherhood of Carpenters Local 25*, 430 U.S. 290, 302 (1977), the Sixth Circuit stated that state causes of action for intentionally inflicting emotional distress are *not* preempted as long as the claimed injury flows from the abusive *manner* in which the employer exercises its proper authority under the collective bargaining agreement (or fails to do so), and not from the "routine exercise of [collective bargaining agreement] rights" alone. *Fox*, 914 F.2d at 802; *see also Knafel*, 899 F.2d at 1483.

The Fourth Circuit majority in this case recognized *no* such distinction; had the majority below done so, its decision would have had to be that petitioner's claim is not preempted by § 301.[5] Nor have the Fifth or Tenth Circuits suggested any "abusive manner" limit to their broad § 301 rule preempting intentional infliction of emotional distress causes of action.

(c) *The Eighth Circuit*: The Eighth Circuit also holds that most intentional infliction causes of action arising in a workplace covered by a collective bargaining agreement are *not* preempted by § 301, applying a *different* standard for making this distinction than the one suggested in the most recent Sixth Circuit cases.

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[5] Petitioner's intentional infliction cause of action does not seek to recover for emotional injuries caused by the fact that the employer cleaned out McCormick's locker and discarded his private property. Rather, the injury for which damages are sought flowed from the *manner* in which the property was discarded: *viz.*, in full view of petitioner's fellow employees, so that they were able to recover and read petitioner's private papers.

Thus, the most recent Eighth Circuit decision—*Hanks v. General Motors Corp.*, 906 F.2d 341, 344 (8th Cir. 1990)—holds that § 301 does *not* preempt a state intentional infliction cause of action where the employer assigned an employee covered by a collective bargaining agreement to work under a supervisor whom the employer knew had sexually assaulted the employee's daughter. In so doing, the Eighth Circuit *expressly* disagreed with the Ninth Circuit's approach in *Miller v. AT&T Network Service*, *supra*, in this regard (and therefore with the approach followed by the Fourth Circuit here, which parallels the *Miller* approach). *Hanks*, 906 F.2d at 344 n.4 ("Inasmuch as the opinion in *Miller v. AT&T Network Services* . . . would suggest a result different from the one indicated . . ., we disagree.")

At the same time, *Hanks* distinguished *Johnson v. Anheuser Busch*, *supra*, finding preemption of an intentional infliction claim, on the basis that in *Johnson*, but not *Hanks*, the essence of plaintiff's cause of action was that the discharge was totally improper *under* the applicable collective bargaining agreement and *therefore* "outrageous." *Hanks*, 906 F.2d at 344.[6]

The Eighth Circuit, then, holds that intentional infliction claims are § 301 preempted only where an alleged labor contract violation is itself the primary basis for demonstrating that the employer's behavior comes within the narrow range of egregious behavior that supports an intentional infliction cause of action. That the action complained of involved a working condition and, according to the employer, complied with the contract is *not* a sufficient basis for § 301 preemption. In the latter regard, the Eighth Circuit law is in direct conflict with the § 301 preemption law in the Fourth, Fifth and Tenth

[6] In *Hanks*, for example, the employer apparently contended that its actions were in compliance with the collective bargaining agreement and, therefore, the employer could not be found to have behaved in an "outrageous" manner. 906 F.2d at 344.

Circuits and in some tension with the law of the Sixth Circuit.[7]

(d) *The Ninth Circuit*: Like the Sixth and Eighth Circuits, the Ninth Circuit, which has decided the largest number of cases in this area, finds some state law intentional infliction cases preempted by § 301 but allows others to go forward. *Compare, e.g., Miller v. AT&T Systems, supra,* with *Galvez v. Kuhn, supra; see also, e.g., Cook v. Lindsay Olive Growers,* 911 F.2d 233, 239-40 (1990); *Harris v. Alumax Mill Products, Inc.,* 897 F.2d 400, 402 (9th Cir.), *cert. denied,* —— U.S. ——, 111 S. Ct. 102 (1990); *Newberry v. Pacific Racing Association, supra,* 854 F.2d at 1150 (preempted); *Tellez v. Pacific Gas & Elec. Co.,* 817 F.2d 53 (9th Cir.), *cert. denied,* 484 U.S. 908 (1987) (not preempted); *Perugini v. Safeway Stores, Inc.,* 935 F.2d 1083, 1085 (9th Cir. 1991) (partially preempted and partially unpreempted). But the Ninth Circuit's governing preemption standard for these kinds of cases is not the same as the standard applied in either the Sixth or the Eighth Circuit toward the same end.

The most fully reasoned Ninth Circuit decision, *Galvez v. Kuhn, supra,* first notes that the Ninth Circuit has been more receptive to § 301 preemption claims of intentional infliction causes of action than the Seventh and Eighth circuits and then takes pains fully to review and explain the state of the Ninth Circuit's cases in this area. 933 F.2d at 779.[8] Having done so, *Galvez* concludes that

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[7] Again, had the Eighth Circuit's standard been applied here, there could have been no basis for a preemption finding: Petitioner's state law intentional infliction cause of action does not depend upon a finding that AT&T violated the applicable collective bargaining agreement by cleaning out his locker upon his termination, or even that AT&T violated the agreement by the manner in which the Company cleaned out the locker.

[8] *Galvez* involved a situation in which a supervisor subjected the plaintiff employee both to racial slurs and to being required to work

in the Ninth Circuit, there is *no* § 301 preemption of an intentional infliction tort cause of action where " '[t]he employer's claim revolved around conduct by his employer that is not even arguably sanctioned by the labor contract.' " 933 F.2d at 780.[9]

Thus, while the Eighth Circuit will not consider an employer's anticipated defense of compliance with the collective bargaining agreement at all, the Ninth Circuit makes an anticipatory reading of the collective bargaining agreement to determine whether the employer's anticipated defense has any realistic chance of success. And, the Sixth Circuit's substance/manner distinction is apparently of no moment in the Ninth Circuit.

(e) *The Seventh Circuit*: We have left the Seventh Circuit to last since that court, too, has held state intentional infliction of mental distress claims sometimes preempted by § 301 and sometimes not preempted but without making it entirely clear what standard governed in making this distinction. So far as appears from its opinions, however, the line of demarcation in the Seventh Circuit is closest to the Ninth Circuit's line as fully articulated in the *Galvez v. Kuhn* case just discussed.

Keehr v. Consolidated Freightways of Delaware, Inc., 825 F.2d 133, 137 (7th Cir. 1977), for example, holds

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an intentionally speeded-up conveyor belt, making the working conditions physically dangerous.

[9] Similarly, *Tellez v. Pacific Gas & Elec. Co., supra*, found nonpreemption of a claim of emotional distress based upon the employer's distribution of a defamatory letter because "[t]he collective bargaining agreement does not envision such behavior." 817 F.2d at 539; *see also Miller v. AT&T Systems, supra*, 850 F.2d at 550 n.5 (finding preemption, but distinguishing *Tellez* on this basis).

Again, under the Ninth Circuit's standard, the Fourth Circuit's conclusion in this case could not stand: The collective bargaining agreement in this case did not affirmatively "sanction" the discarding of petitioner's very personal papers in full view of fellow employees; and mere "[c]ompliance with the [collective bargaining agreement] . . . cannot temper the potentional outrageousness of the conduct." *Galvez v. Kuhn, supra*, 933 F.2d at 780.

that a state intentional infliction of mental distress claim based upon the use of abusive language by a supervisor is *not* § 301 preempted. The Seventh Circuit reached this conclusion even though the employee's contention was that the incident was part of a campaign to provoke a basis for discharge, and even though the employee could have filed a grievance against the employer to protest the incident. 825 F.2d at 136, 138.

On the other hand, *Douglas v. American Information Technologies Corp.*, 877 F.2d 565 (7th Cir. 1989), while explicitly recognizing *Keehr* as good law, 877 F.2d at 571, announced that there is § 301 preemption wherever the "intentional infliction of emotional distress claim consists of allegedly wrongful acts directly related to the terms and conditions of her employment," *id.* at 572, n.10. *Keehr* was different, said the Seventh Circuit, because "the plaintiff's claim 'revolved around conduct by his employer that is not even arguably sanctioned by the labor contract.'" 877 F.2d at 572, *quoting Keehr*, 825 F.2d at 138 n.6.

* * * *

In sum, the various courts of appeal have articulated sharply conflicting standards—and reached irreconcilable results—in the cases concerning whether employees covered by collective bargaining agreements can maintain state law causes of action for intentional infliction of emotional distress against thier employers. And, as the sheer number of cases addressing this issue in the last three years indicates, the issue is one of recurring importance in the federal courts.[10]

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[10] The above citations do not exhaust the court of appeals cases in which § 301 preemption of intentional infliction claims was at issue; there are other cases, for example, in the First, Fourth, and Ninth Circuits which either repeat the same standards and results or do not reach the merits. And, of course, for each reported court of appeals case there is, in all likelihood, an unreported appellate case and several district court cases, reported and unreported. Indeed, the district court in this case regarded the issue as so routine

(2) The conclusion reached by the Fourth Circuit majority here is not only in conflict with the conclusions reached by other circuits, it is wrong. Section 301 preemption cannot be stretched so far as to defeat an employee's state law claim against his/her employer for intentional infliction of emotional distress where state law, and not the applicable collective bargaining agreement, is alleged to prohibit the employer from acting in that manner.

A labor contract's management rights clause, such as the one relied uopn here, simply *maintains* management's state law discretion over certain areas of its business, a discretion that nonunion employers enjoy without regard to any collective bargaining agreement. A management rights clause, in other words, does *not* create any rights the employer does *not* have as a matter of state law. That being so, there is plainly no federalism reason why an employer covered by a management rights clause should be able to exercise this discretion in a manner that, as a matter of state law, is generally considered "outrageous and intolerable", when nothing in the agreement *requires* that the employer so behave.[11]

To preempt state law intentional infliction causes of action simply because the applicable labor contract does not *forbid* management's actions vindicates *no* federal interest. Such a rule does nothing but provide an unmerited advantage to employers covered by collective bargaining agreements over employers who have no such agreement

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that all that was necessary was a bench announcement of the ruling. Pet. App. 35a-39a.

[11] This is not to say that the employer should not be permitted to offer its argument that the fact that a labor contract *permits* the challenged behavior demonstrates that the behavior is not sufficiently outrageous to be tortious. That contract-based argument can be decided under federal law, as the dissent in this case shows, without throwing out the plaintiff's state law cause of action in its entirety. *See* Pet. App. 27a.

by permitting the former but not the latter to exercise their management discretion in an intolerable manner even though the State has determined to forbid *all* employers from so doing.

CONCLUSION

For the reasons state above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS H. ROBERTS
2nd Floor, Suite A
33 S. 13th Street
Richmond, VA 23219

MARSHA S. BERZON
177 Post Street
San Francisco, CA 94108

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390